Supreme Court, U.S.
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No. 96-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Delaware

Brief Opposing Motion to Affirm

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Brief Opposing Motion To Affirm

1. Contrary to the government's assertion, this case is appropriate for resolution now by this Court. The essential elements of Playboy Entertainment Group's ("Playboy's") claim challenging Section 505 of the Telecommunications Act of 1996 are not in dispute and were acknowledged by the lower court. Section 505 will cut off protected speech for two-thirds of the broadcast day for all households in the cable systems affected, including the two-thirds of homes in which no children reside. While Section 505 purports to provide cable operators with a choice of time channeling between 10:00 p.m. and 6:00 a.m. or totally scrambling both the audio and video signal, the "substantial expense" to employ scrambling technology makes time channeling the only viable option as even the government's expert witness agreed. Tr. at 459 (Test. of J. Kramer). As the lower court noted, all major cable operators have announced that they will adopt time channeling if Section 505 becomes effective. J.S. App. 20(a).

Given the substantial burden of Section 505 on protected speech, the lower court erred in not recognizing the existence of a lesser restrictive means to allow parents to protect children from any partially scrambled signals of adult networks. Section 504 provides parents the means to fully scramble any cable channel, J.S. App. 16a, including adult oriented networks, by requiring cable operators to block at their expense any channel upon request. Further discovery or hearings will not alter these fundamental facts.

This is not, as Appellees frame the issue, a request for this Court to enjoin a federal law while this Court considers whether or not to accept the case for full review.[1] After

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[1] For that reason, Appellees' reliance on *Turner Broadcasting Sys. v. FCC*, 507 U.S. 1301, 1304 (1993), in which the Chief Justice denied injunctive relief pending appeal, is misplaced. Playboy now stands in the same position as appellants in *Turner*, who sought and obtained plenary review by this Court. *See Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 636 (1994)("Cable programmers and cable operators engage in and

considering post-hearing briefs, the court below decided to enjoin enforcement of Section 505 by its own order pending review by this Court, just as the District of Columbia Circuit enjoined enforcement of Section 10 of the 1992 Cable Act in *Alliance for Community Media* v. *FCC*, 56 F.3d 105 (D.C. Cir. 1995), *rev'd in part and aff'd in part sub nom. Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374 (1996). Contrary to the government's claim about the "exceptional" nature of injunctive relief barring enforcement of an act of Congress in these circumstances, such relief was granted in *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989). That case, which is directly on point, is not mentioned by Appellees.

There are no "issues that remain to be resolved in further proceedings," Mot. to Aff. at 12, that are of constitutional significance, or that preclude plenary review now. None of the "potential factual uncertainties" the government identifies justifies delay. Given that the experts agree that most cable systems lack the technology to scramble their audio signal, there is no real dispute regarding "the number of households with the potential for signal bleed." Moreover, the government has always disavowed any need to prove "the effects of sexually explicit materials on children." Mot. to Aff. at 16. Nor is there any disagreement that Section 505 will cut off access by willing viewers to Appellant's networks. The government merely questions the precise amount of the revenue loss associated with this restriction on protected speech—a matter that is not a prerequisite to constitutional review. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 211-212 n.8 (1975). Appellees suggest further proceedings are necessary so that Appellant can demonstrate the effectiveness of less restrictive measures, such as Section 504. But this Court has repeatedly—and emphatically—denied the need for such proof. *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2391-2394 (1996); *Sable Communications*, 492 U.S. at 129.

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transmit speech, and they are entitled to the speech and press provisions of the First Amendment."). Other cases Appellees cite are distinguishable for the same reason.

2. Section 505 imposes an unconstitutionally heavy burden on protected speech. As everyone agrees, such burdens are subject to "strict scrutiny or something very close to strict scrutiny." J.S. App. 25a; *see* Mot. to Aff. at 15. It is bedrock law that the First Amendment permits laws that restrict unwanted speech "by an affirmative act of the [listener]," *Rowan* v. *United States Post Office Dep't.*, 397 U.S. 728, 737 (1970), but prohibits laws by which "the Government itself can shut off the flow of [speech] to protect those who might potentially be offended," *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 72-73 (1983). The government may not seek a "marginal degree of [added] protection * * * by purging all mailboxes of unsolicited material." *Id.*; *see also Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). As Justice O'Connor wrote in *Turner Broadcasting System*, "[i]f the government wants to protect householders from unwanted solicitors, it may enforce 'No Soliciting' signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say." 512 U.S. at 683 (concurring in part and dissenting in part). *See Martin* v. *City of Struthers*, 319 U.S. 141 (1943).

a. The government argues erroneously that this Court's decisions in *Denver* and in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), support Section 505(b)'s sixteen hour per day ban of Appellant's networks. But this conclusion stems from a misreading of relevant precedent and a mischaracterization of the nature of Section 505.

Appellees ignore the distinction between the exercise of private editorial discretion and the imposition of a government mandate by asserting that Section 505 is constitutional "for the same reasons" as Section 10(a) of the 1992 Cable Act. Mot. to Aff. at 17. That missing distinction was a central feature of *Denver*, 116 S. Ct. at 2387 (plurality op.); *id.* at 2398 (Stevens, J., concurring); *id.* at 2403 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2424 (Thomas, J., concurring in part and dissenting in part), and has been emphasized in other decisions as well, *e.g.*, *Turner Broadcasting Sys.*, 512 U.S. at 683 (O'Connor, J., concurring in part and dissenting in part) ("The question is not whether there will be control over who gets to speak over

cable—the question is who will have this control."). *Cf. Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 115 S. Ct. 2338 (1995) (private decision to exclude speakers raises no constitutional concern). Indeed, even the Court of Appeals in *Denver* (which had upheld all of Section 10) acknowledged that if "decisions of cable operators not to carry indecent programs" pursuant to Section 10(a) "were treated as decisions of the government, the Commission and the United States would be hard put to defend the constitutionality of these provisions." *Alliance for Community Media*, 56 F.3d at 113. There is no legitimate comparison here between Section 10(a), which *permits* cable operators to exert control over speech, and Section 505, which *requires* them to do so. The liberties Appellees take in interpreting *Denver* underscore the importance of this Court's review of the instant appeal.

The government does not seriously dispute the fact that turning off entire networks for two-thirds of the broadcast day is a far greater restriction on speech than was authorized in *Pacifica*. J.S. App. 15a-17a. In *Denver*, this Court approved only a voluntary measure that "likely restricts speech *less* than * * * the ban at issue in *Pacifica*,"[2] while striking down mandatory requirements that are "remarkably similar" to Section 505. 116 S. Ct. at 2387 (plurality op.) (emphasis added).[3] Appellees now seek to distinguish

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[2] The government asserts that Section 505 is less restrictive than Section 10(a), upheld by this Court in *Denver*, because a cable operator "could choose to 'ban' the indecent programming altogether" as a practical consequence of Section 10(a). Mot. to Aff. at 18 (quoting *Denver*, 116 S. Ct. at 2387). Perhaps a cable operator could do so (despite the doubts this Court expressed about that possibility in *Denver*), just as a cable operator responding to Section 505 could choose to drop *Playboy Television* altogether. But unlike the permissive solution of Section 10(a), which allows cable operators to accept "indecent" leased access programming, a cable operator could not choose to transmit networks covered by Section 505 outside "safe harbor" hours without subjecting itself to devastating economic consequences.

[3] Throughout this litigation prior to *Denver*, the government repeatedly characterized Section 505 as being "remarkably similar" to Section 10(b). Defs.' Mem. in Opp'n to Pls.' Mots. for

Section 505 from the unconstitutional restrictions of Sections 10(b) and (c). For example, the government claims that Section 505 is "significantly less restrictive" than Section 10(b) because it does not raise the same privacy concerns (as the written request requirement of Section 10(b)), but it ignores the court's finding below that obtaining a trap pursuant to Section 505(a) "interferes with the spontaneous nature" of impulse purchases of adult programming and that the "[p]rofessional installation of traps also raises privacy concerns" that could dissuade subscribers from purchasing the service. J.S. App. 18a-19a. Further, Appellees assert that, unlike Section 10(b), Section 505 does not permit a 30-day delay before the cable operator must respond to a subscriber's initial request for service. Mot. to Aff. at 19. However, this ignores that Section 505(b) imposes a continuing delay for viewing until after 10 p.m. every day that applies to all existing and prospective viewers for all time.[4]

b. Contrary to Appellees' claims, Section 505 does not give cable operators "flexibility." The court below acknowledged that there is "undoubtedly a substantial expense involved in complying with subsection (a)." J.S. App. 32a. Indeed, implementation of digital transmission technology would cost billions of dollars, *see* Playboy Ex. 2,

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Prelim. Inj. at 3, 34; Defs.' Mem. in Opp'n to Pl.'s Appl. for a T.R.O. at 2, 21. Its post-*Denver* understanding, by contrast, is that Section 505 is intended to address a problem that is "remarkably similar" to that covered by Section 10(a). Mot. to Aff. at 17.

[4] The court below said it was "skeptical" about only consolidated plaintiff Graff Pay-Per-View Inc.'s estimates of revenue loss. J.S. App. 19a-20a n.19. No similar questions were raised about Appellant Playboy's estimates, or about its direct experience in Hartford, where compliance with Section 505 through time channeling resulted in a 31 percent decline in revenue. Tr. at 18 (Test. of A. Lynn). Regardless of the precise amount of loss, however, there is no dispute regarding the fact that forcing networks to go black for 16 hours per day cuts off communication with willing adult viewers. *See Denver*, 116 S. Ct. at 2394-97 (plurality op.) (restrictions violate First Amendment even on noncommercial channels where there is no lost revenue), *id.* at 2409-10 (Kennedy, J., concurring in part, concurring in judgment, and dissenting in part) (same).

Decl. of W. Ciciora ¶ 32, and the government's experts agreed that cable operators would not convert to digital transmission to comply with Section 505, Tr. at 425-426 (Test. of J. Kramer). Installation of upgraded converters for all subscribers across the board would cost more than one billion dollars. J.S. App. 17a. Even the least expensive option would cost $8-10 million—several times more than the total profits of the affected networks.[5] Contrary to the government's claim, complete blocking is not a viable option, and its statement that the government is not required to "subsidize" such blocking is without meaning.[6] The court below, J.S. App. 32a-33a, the cable operators, Playboy Exs. 23-24, and even the government's witnesses, Tr. at 459-460 (Test. of J. Kramer), agreed that a rational cable operator would have but one choice for complying with Section 505: time channeling.

3. Contrary to Appellees' claims, Section 505 is not a narrowly tailored solution because it is not the least restrictive means and it fails to address adequately the government's stated interest.

a. The existence of a less restrictive statute aimed at the same problem as a more restrictive one strongly suggests that the challenged provision is unconstitutional. *Boos v. Barry*, 485 U.S. 312, 329 (1988); *Denver*, 116 S. Ct. at 2393

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[5] Appellees dispute Appellant's characterization of the lower court's assessment of the compliance costs associated with Section 505(a). Mot. to Aff. at 23 n.12. However, after acknowledging the "substantial expense" associated with all across the board scrambling options, the lower court found that Section 505(a) does not impose "potentially fatal economic burdens" only because cable operators may "choose to comply with § 505 by time-channeling in accordance with subsection (b)." J.S. App. 32a-33a.

[6] Appellees assert that Congress may legitimately impose some costs upon cable operators in service of an important governmental interest. But the government cannot impose costs that seriously impede speech. *Erznoznik*, 422 U.S. at 211-212 n.8. In any event, under Section 504 the government requires cable operators to provide blocking upon request at no charge to the subscriber.

(plurality op.).[7] Appellees assertion that the government has no obligation to "conclusively prove its case in favor of constitutionality" before an injunction may be granted, Mot. to Aff. at 16 n.8, effectively nullifies this constitutional requirement. Neither *Denver* nor *Sable* can be explained under the government's reasoning, since there was "no evidence" in the record in either case "as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be" yet enforcement of the law was enjoined in both cases. *Sable*, 492 U.S. at 130 (emphasis in original); *Denver*, 116 S. Ct. at 2394; *see also FCC* v. *League of Women Voters*, 468 U.S. 364, 401 n.27 (1984).

Given this settled law, it is unclear how Appellees could assume that a more restrictive measure could be justified in this case. All of the congressional findings in the Telecommunications Act support the conclusion that voluntary measures will be sufficient to empower parents to control their children's viewing.[8] Additionally, all of the government's witnesses confirmed the effectiveness of blocking upon request.[9] To whatever extent Appellees are concerned that "inattentive parents" or other "practical difficulties" may render voluntary measures less effective than Section 505, this Court explained in *Denver* that other

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[7] Appellees state that this Court "specifically cited Section 505" in *Denver*, Mot. to Aff. at 19, but neglect to mention that this Court expressly declined to rule on its constitutionality. *Denver*, 116 S. Ct. at 2392.

[8] The Telecommunications Act of 1996 §§ 551(a)(8) & (a)(9). *See Turner Broadcasting Sys.*, 512 U.S. at 678-680 (O'Connor, J., concurring in part and dissenting in part).

[9] *See* Mahlo Decl. ¶ 7 (declaring that cable system provided a lockbox the same day she requested it, and without charge); Allen Dep. Tr. at 19 (cable company installed blocking device after he complained, and it has been effective); Snesko Dep. Tr. at 51-52 (cable company made lockboxes available, and they notified their customers via post card that this option was available). Where, as here, First Amendment rights are involved, there is "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley*, 115 S. Ct. at 2344; *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984).

less restrictive measures, such as "informational requirements," could serve the government's interest fully. 116 S. Ct. at 2393-2394. Similar considerations led this Court to conclude that mandatory blocking of indecent leased access channels under Section 10(b) is "considerably" more restrictive than necessary, failing to satisfy even intermediate constitutional scrutiny. *Id.* at 2391.

b. It is also well-established that a regulation cannot be considered narrowly tailored where a substantial portion of the burden on speech does not advance the government's objective. *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 (1991); *Turner Broadcasting Sys.*, 512 U.S. at 682 (O'Connor, J., concurring in part and dissenting in part). Nevertheless, Appellees fail to address the fact that the FCC concluded that "time channeling" was inadequate to protect children from indecent programming on public and leased access channels, *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 998, 1009 (1993), and the District of Columbia Circuit affirmed this finding, *Alliance for Community Media*, 56 F.3d at 125. With respect to the scrambling option, Appellees suggest that children actively circumvent such safeguards. Mot. to Aff. at 6 n.4. But as this Court emphasized, the fact that no solution short of an absolute ban may protect against "assault by a determined child," does not permit the government to reduce the adult population to viewing only what is fit for children. *Denver*, 116 S. Ct. at 2393; *Sable*, 492 U.S. at 128.

4. Appellees' claim that Section 505 is consistent with equal protection requirements does not accurately characterize this Court's discussion of that issue in *Denver*. This Court expressly rejected the same argument when the government raised it in that case, finding in the cable television context that Congress "now has tried to deal with most of the problem." *Denver*, 116 S. Ct. at 2393. Indeed, existing safeguards, from lockboxes to the V-chip, effectively cover *all* channels, not just those selected by the government for disfavored treatment. Additionally, the government's argument that "non-adult" premium channels have less sexually explicit content than "adult" channels misses the point. Movies with no sexual content routinely include

content that goes to the heart of the government's professed interest, the audio bleed that can "enlarge[] a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 749. Such R-rated films as *Beverly Hills Cop 2* contain on average a profane word every 30 seconds, Playboy Ex. 1, A. Lynn Decl. ¶ 28, and the government admits (quoting the District Court) that "non-adult channels show '*mainly* "R" rated movies which contain some sexually explicit scenes.'" Mot. to Aff. at 24 (emphasis added). Finally, without disputing Appellees' claim that the amount of "sexually explicit" programming on a non-adult premium channel is only one-sixteenth that presented on Appellant's channels, it is unclear how discriminatory treatment could be justified. The "random[]" or "intermittent[]" presentation of sexually explicit scenes on non-adult premium channels suggests that voluntary blocking solutions are far less effective for those networks than for adult channels because premium channels intersperse programming designed for children with that intended for adults, and parents cannot readily tell when the offending material may appear. *See Denver*, 116 S. Ct. at 2429 (Thomas, J., concurring in part and dissenting in part); *Alliance*, 56 F.3d at 125. Accordingly, the statutory distinction between speakers in Section 505 fails even rational basis scrutiny. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995); *cf. Erznoznik*, 422 U.S. at 214-215.

5. The government misconstrues Appellant's claim that Section 505 is unconstitutionally vague by asserting that Playboy is uncertain only about what other networks may be affected by its reach. This plainly ignores Playboy's argument that the deficiencies of Section 505 make it impossible for Appellant to adjust its own programming to conform to the law. J.S. at 27-28. In this regard, Appellees attempt to read Section 506 (which adds "nudity" to the definition of indecency) out of the Telecommunications Act. This argument ignores this Court's holding in *Pacifica*, 438 U.S. at 739-740, that statutory terms written in the disjunctive are intended to have separate meanings, as well as the holding in *Denver*, 116 S. Ct. at 2390, that leased access channels should be treated in the same way as other channels that carry "indecent" programming. Finally, Appellees' brief reinforces the conclusion that this Court must closely scrutinize the indecency standard by its suggestion that

Section 505 is subject to a lower duty of specificity applicable to civil statutes. This ploy is to no avail, since the Communications Act contains criminal penalties and the government acknowledges—as it must—that those who "willfully" violate the Communications Act are subject to criminal prosecution. Mot. to Aff. at 28 n.16. The FCC has referred indecency matters for criminal prosecution in the past, *e.g.*, *Pacifica Found. Inc.*, 2 FCC Rcd. 2698 (1987), and its discretionary ability to do so is cause for greater, not less, concern. *See Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983).

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to grant plenary review in this case.

Respectfully submitted,

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